90-1058

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL A. HARTMAN and
BENJAMIN H. WOODS,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1962(c) is unconstitutionally vague in its failure to define "pattern" of racketeering activity?

2. Whether the evidence was sufficient as a matter of law to prove that Petitioners conducted the affairs of the enterprise *through* a pattern of racketeering activity?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Michael A. Hartman and Benjamin H. Woods respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on October 1, 1990.

OPINIONS BELOW

The opinion of the court of appeals is reported at 915 F.2d 854 and is reprinted in the appendix, *infra*, at 26a. The district court's opinion is unreported and is reprinted in the appendix, *infra*, at 25a.

JURISDICTION

Petitioners were charged by indictment in the United States district court with violating federal criminal statutes. Judgment of conviction was entered by the district court on January 19, 1990 as to Petitioner Hart-

man and on January 18, 1990 as to Petitioner Woods. On October 1, 1990 the court of appeals entered its judgment affirming the convictions.

The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(a) and Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be . . . deprived of life, liberty or property, without due process of law.

STATEMENT OF THE CASE

This case involves application of section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961, *et seq.*, to an alleged "pattern" of bribery involving Petitioners Hartman and Woods. The Pittsburgh City Council, of which Woods was an elected member, is named as the RICO enterprise.[1]

The central allegation of the indictment is that Woods unlawfully bartered the exercise of his discretion as a member of City Council in return for pecuniary benefits from Hartman and an unindicted co-conspirator, Joseph Wozniak. The predicate racketeering acts are all charged under the Pennsylvania bribery statute, 18 Pa.C.S. § 4701.

Among the pre-trial motions filed on Petitioners' behalf was a Motion to Dismiss the indictment on the grounds that 18 U.S.C. § 1962(c) was facially void for vagueness. 25a. The motion was denied by the district court from the bench in the course of pre-trial proceedings. 24a.

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[1] The Pittsburgh City Council is the legislative branch of city government. Its powers and duties, *i.e.*, its "affairs", are defined at Article 3 of the Home Rule Charter of the City of Pittsburgh. 26a.

Two separate axes of unlawful activity are described in the indictment. The first axis involves Woods' relationship with Petitioner Michael A. Hartman. Hartman was president and owner of Ablebuilt Construction Co., Inc., which was the successful bidder on a number of construction and rehabilitation projects for the Housing Authority of the City of Pittsburgh and for the Urban Redevelopment Authority.

In addition to his public duties as a member of the Pittsburgh City Council, Woods was also on the Board of Directors of the Housing Authority of the City of Pittsburgh. The Housing Authority is an independent body politic that receives its funding from the federal government. Testimony at trial established that City Council does not control the Authority's funding and has no role in approving monies that come through a cooperation agreement between the City and the federal government. That the conduct of the Housing Authority's business is not within the ambit of the affairs of City Council is significant to the question presented regarding the required nexus between the racketeering activity and the affairs of the enterprise.

At trial the government's principal witness, Louis Bilotta, testified that he delivered a number of cash payments from Hartman to Woods.[2] Almost without exception, the payments were related to Hartman's requests for Woods' help in resolving potential snags in the administration of ongoing contracts between Ablebuilt and the Housing Authority. Several payments, for example, were accompanied by a request for Woods' help in obtaining the release of progress payments for projects already under construction. The Director of the Housing Authority testified that he received a call from Woods, whom he regarded as "one of my bosses" by virtue of his

[2] Both Hartman and Woods, who were business partners in a restaurant venture, took the stand and hotly disputed Bilotta's testimony regarding improper payments. Given the jury's verdict, however, Bilotta's testimony must be accepted at face value.

seat on the Authority's Board, regarding the delay in processing Ablebuilt's payments.

There were only two payments testified to by Bilotta that did not involve the administration of Hartman's contracts with the Housing Authority. One payment related to Hartman's request that Woods call the Director of the Urban Redevelopment Authority and ask him to "take it easy" on Hartman during a scheduled meeting to discuss one of Hartman's contract proposals.

The URA is a statutory agency which uses federal funds to stimulate development of privately owned housing in the City of Pittsburgh. The program under which federal dollars to encourage renovation of rental properties by private owners. There is no functional link between the URA and City Council.

The second payment was given to Bilotta to deliver to Woods with the message that Hartman's brother was going to take a licensing exam administered by the Department of Building Inspection. There was no testimony regarding what Woods is supposed to have done as consideration for this payment.

The second axis described in the indictment involves Woods' relationship with Joseph Wozniak, an unindicted co-conspirator who was in the business of selling waterproofing products. Woods and Wozniak had an agreement under which Woods received a 10% commission on sales Wozniak made as the result of Woods' "opening doors". Three of the racketeering acts allege that Woods wrongfully bartered the exercise of his discretion as a public servant in assisting Wozniak with sales to the Three Rivers Stadium Authority, the Allegheny County Sanitary Authority, and the general contractor on the Bloomfield Bridge project. Testimony indicated that Woods called the Directors of the two agencies and asked them to meet with Wozniak and, further, that he called the chief engineer on the bridge project on Wozniak's

behalf. Neither these entities nor their activities were demonstrably connected to the affairs of City Council.

The Director of the Allegheny County Sanitary Authority testified that he agreed to meet with Wozniak because Woods was a friend. The Director of the Stadium Authority testified that he agreed to meet with Wozniak because he "owed" Woods; the basis for his perceived indebtedness was not identified.

The jury adjudicated Petitioners guilty of conducting the affairs of the Pittsburgh City Council through a pattern of racketeering activity. Judgement of conviction was imposed; Petitioners were sentenced to substantial terms of imprisonment; and the convictions were affirmed by the court of appeals.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE QUESTION RAISED BY THE CONCURRING OPINION IN *H.J. INC. v. NORTHWESTERN BELL TELEPHONE CO.*, —— U.S. ——, 109 S.Ct. 2893 (1989) REGARDING THE CONSTITUTIONALITY OF THE RICO STATUTE.

In *H.J. Inc. v. Northwestern Bell Telephone Co.*, —— U.S. ——, 109 S.Ct. 2893 (1989), this Court reviewed —and endeavored to refine—the scope of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* The "pattern" requirement of section 1962 was the term particularly at issue, and the Court defined it to require a showing of "continuity plus relationship". *Id.*, 109 S.Ct. at 2900.

The concurring opinion by four Justices of the Court found this definition to be about as helpful in construing the meaning of the statute as to say, "life is a fountain". *Id.*, 109 S.Ct. at 2907. The concurrence went on to raise a direct challenge to the constitutionality of the statute on vagueness grounds:

> No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derives from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.

Id. at 2908.

Review of the case law decided after *H.J. Inc.* indicates that the opinion has produced a result contrary to the Court's presumed intent in agreeing to review the statute: as the direct result of the decision, confusion regarding proper application of the statute has intensified, rather than abated.

Confusion having its origin in the majority opinion is manifest in the lower courts' struggles to identify the

Castor and Pollux of "continuity" and "relationship".[3] In response to the concurring opinion, lawyers are obediently raising constitutional challenges to the statute at every turn.[4]

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[3] *See*, for example, *Hindes v. Castle*, 740 F.Supp. 327 (D.Del. 1990), reviewing at length the problems encountered by lower courts in attempting to apply the majority's definition. *See, also, United States Textiles, Inc. v. Anheuser-Busch Companies, Inc.*, No. 89-1296 (7th Cir. 1990, filed August 31, 1990), 1990 U.S. App. LEXIS 15519 ("amorphous concept" of continuity still "not clear"); *Hall American Center Associates Limited Partnership v. Dick*, 726 F.Supp. 1083 (E.D. Mich. 1989) (pattern requirement "continues to spawn considerable case law, commentary, and confusion"); *Friedman v. Arizona World Nurseries Limited Partnership*, 730 F.Supp. 521 (S.D. N.Y. 1990) (attempting to apply "continuity" requirement in evaluating sufficiency of civil pleading); *Wilson v. Askew*, 709 F.Supp. 146 (W.D. Ark. 1989) (same).

[4] *See*, for example: *United States v. Angiulo*, 897 F.2d 1169 1st Cir. 1990) (RICO not vague as applied to La Casa Nostra); *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385 (6th Cir. 1989) (remand for consideration of statute's constitutionality, noting that the "proper resolution of RICO's constitutionality is not beyond any doubt"); *United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990) (RICO not vague as applied); *Nagel v. First Michigan Corp.*, No. 4:89-CV-114 (W.D. Mich., filed December 3, 1990), 1990 U.S. Dist. LEXIS 16192 (vagueness issue not reached); *H.J. Inc. v. Northwestern Bell*, 734 F.Supp. 879 (D. Minn. 1990) (on remand, case dismissed without reaching the "important and intringuing question of the constitutionality of RICO"); *Levin-Richmond Terminal Corp. v. International Longshoreman's Union*, No. C-90-1460 (N.D. Ca., filed November 19, 1990), 1990 U.S. Dist. LEXIS 16335; *United States v. Lobue*, No. 90 CR 726 (N.D. Ill., filed November 20, 1990), 1990 U.S. Dist. LEXIS 16210 (statute not vague as applied); *United States v. Eisen*, No. CR-90-0018 (E.D. N.Y., filed October 19, 1990), 1990 U.S. Dist. LEXIS 14219 (statute vague only at "outer reaches"); *United States v. Andrews*, 749 F.Supp. 1520 (N.D. Ill. 1990) (refusing to consider facial attack); *United States v. Gatto*, 746 F.Supp. 432 (D. N.J. 1990) (not vague as applied to organized crime family); *United States v. Bailin*, No. 89 CR 668 (N.D. Ill., filed July 17, 1990), 1990 U.S. Dist. LEXIS 9168; *The Chase Manhattan Bank v. Malatesta*, No. 86 Civ. 1808, July 6, 1990 (S.D. N.Y.), 1990 U.S. Dist. LEXIS 9222 (constitutionality of RICO "close question"); *Aldridge v. Lily-Tulip, Inc.*, 741 F.Supp. 906

Petitioners respectfully submit that in the wake of *H.J. Inc.*, the Court is obliged to clear the air on the question of RICO's constitutionality. This case would give the Court the opportunity to resolve the threshold question presented: is the statute unconstitutionally vague on its face? The issue is cleanly drawn and would permit straightforward resolution of one of the fundamental questions confronting the lower courts.

If the Court were to hold that the statute is facially void, the questions raised by the concurrence would be resolved once and for all. In the alternative, a holding that the statute is not facially void would comprise a significant step in the process of clarification made necessary by the concurrence. Petitioners therefore respectfully request that a writ of certiorari issue to review the judgment of the court of appeals.

(S.D. Ga. 1990); *United States v. Paccione*, 738 F.Supp. 691 (S.D. N.Y. 1990); *Beck v. Edward D Jones & Co*, 735 F.Supp. 903 (C.D. Ill. 1990); *Uniroyal Goodrich Tire Co. v. Munnis*, Civil Action Nos. 89-2690, 89-4585 (E.D. Pa., filed April 12, 1990), 1990 U.S. Dist. LEXIS 4320; *Kauffmann v. Yoskowitz*, No. 85 Civ. 8414 (S.D. N.Y., filed April 6, 1990), 1990 U.S. Dist. LEXIS 3752; *Adelphi Institute, Inc. v. Terranova*, No. 89 Civ. 7203 (S.D. N.Y., filed March 21, 1990), 1990 U.S. Dist. LEXIS 3066; *United States v. Busacca*, 739 F.Supp. 370 (N.D. Oh. 1990); *United States v. Young & Rubicam, Inc.*, 741 F.Supp. 334 (D. Ct. 1990); *Minpeco, S.A. v. Hunt*, 724 F.Supp. 259 (S.D. N.Y. 1989); *Orchard Hills Cooperative Apartments, Inc. v. Germania Federal Savings & Loan Association*, 720 F.Supp. 127 (C.D. Ill. 1989); *In Re: Ethanol Plants Securities Litigation*, MDL Dkt. No. 679 (W.D. Mo., filed November 14, 1989), 1989 U.S. Dist. LEXIS 13717 (abandonment of civil RICO claim would be "understandable" in light of the concurrence).

II. THERE IS A NEED FOR GUIDANCE FROM THIS COURT ON THE IMPORTANT CONSTITUTIONAL QUESTION OF WHEN, IF AT ALL, A CRIMINAL STATUTE MAY BE SUBJECT TO *FACIAL* ATTACK FOR VAGUENESS.

The court of appeals rejected Petitioners' facial challenge to the validity of section 1962(c), holding that outside of a First Amendment context a defendant may raise a vagueness challenge "only if the challenged statute is vague as to that party's conduct". 18a. Because Petitioners did not contend that First Amendment values were implicated by application of the RICO statute, the court held that Petitioners were "confined to a challenge that the statute is unconstitutional in its application to their specific conduct". 18a.

This opinion is disruptive for several reasons. First, it disregards precedent from this Court upholding facial challenges to the vagueness of criminal statutes *outside* a First Amendment context. *See, Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979) (criminal sanctions in abortion statute facially vague). *See also, United States v. Powell*, 423 U.S. 87, 92 (1975) (statute which fails to proscribe a "comprehensible course of conduct . . . may not constitutionally be applied to any set of facts").

Kolender v. Lawson, 461 U.S. 352 (1983) reviewed a vagueness challenge to a criminal ordinance raised by means of a civil action for declaratory and injunctive relief. The case, by definition, excluded consideration of the ordinance "as applied", but the absence of a factual predicate regarding the statute's application was irrelevant to the Court's consideration. In *Kolender* the Court found the ordinance to be facially void for vagueness.

The court of appeals' decision effectively adopted and brought into law the *dissenting* opinion in *Kolender*, which argued that a criminal statute cannot be challenged as constitutionally vague unless it is impermissibly vague in all of its applications. If the Court per-

mits the principles of the *Kolender* dissent to become law by insinuation, the questions presumably answered by the *Kolender* majority will remain open and unresolved.

The decision below is symptomatic of uncertainty in the lower courts regarding the principles applicable to facial challenges for vagueness. In reaching its holding, the court of appeals cited *New York v. Ferber*, 458 U.S. 747 (1982) as authority for the proposition that a defendant may not present a facial vagueness challenge outside a First Amendment context. Petitioners would contend that the court's reliance on Ferber is misplaced. *Ferber* was an overbreadth case, not a vagueness case. Whether a statute includes within its sweep a substantial amount of constitutionally protected conduct is a classic statement of overbreadth analysis. Such analysis has no relevance to the vagueness issue presented here.

Although this Court has noted an interrelationship between vagueness and overbreadth, constitutionally significant distinctions remain. In the view of one of our leading scholars: "Vagueness is a constitutional vice conceptually distinct from overbreadth in that an overbroad law need lack neither clarity nor precision, and a vague law need not reach activity protected by the first amendment." Tribe, *American Constitutional Law*, § 12-31, p. 1033 (2d Ed. 1988).

The failure of lower courts to apprehend such distinctions has muddied the waters of constitutional adjudication in this area. The distinction was also blurred by the Court in *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, *supra*, holding that, "In a facial challenge to the overbreadth *and vagueness* of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates*, *supra*, 455 U.S. at 494 (emphasis added).

The constitutional vice of overbreadth centers on a legislative effort to proscribe something that the Consti-

tution protects. At issue are legislative acts of commission—affirmative attempts to forbid constitutionally protected activities. As noted previously, whether a statute includes within its sweep a substantial amount of constitutionally protected conduct is a classic statement of overbreadth analysis.

Vagueness challenges are based on acts of legislative omission—a *failure* to provide the clarity and definiteness required by the due process clause.

The concepts overlap in the case of a statute which, because of its failure to define proscribed conduct with sufficient clarity, may be interpreted to reach constitutionally protected activity. That is *not* the basis of Petitioners' challenge to section 1962(c). What is presented here is a pure due process attack.

Two objectives have traditionally been ascribed to the due process requirement of clarity and definiteness in criminal statutes. The first focuses on the individual offender, requiring that the law provide actual notice to citizens of exactly what conduct is prohibited, in terms sufficiently precise that persons of reasonable intelligence need not guess at their meaning. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

Second, due process requires that criminal statutes provide explicit standards in order to preclude the possibility of arbitrary or discriminatory enforcement. This concern is not restricted to consideration of the law as it applies to the individual offender, but has a broader, institutional focus. See, *Kolender v. Lawson*, *supra*, 461 U.S. at 361 (statute facially void because it would encourage arbitrary enforcement); *Smith v. Goguen*, 415 U.S. 556, 575 (1974) (statute which fails to provide "clear guidelines" and thus "allows policemen, prosecutors and juries to pursue their personal predilections" violative of due process); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 (1972) (absence of clear

standards governing the exercise of enforcement discretion "permits and encourages an arbitrary and discriminatory enforcement of the law."); *Giacco v. Pennsylvania*, 382 U.S. 399, 402-03 (1966) (statute which leaves judges and jurors free to decide guilt or innocence without reference to "legally fixed standards" fails to meet the requirements of the due process clause).

The constitutional imperative to provide explicit standards for law enforcement is "the more important aspect of the vagueness doctrine." *Kolender v. Lawson*, *supra*, 461 U.S. at 358. In *Kolender* the Court relied solely on this due process imperative in concluding that the statute was facially void. *Id.* at 361.[5]

The issue is similar to that presented in a Fourth Amendment context. At the core of the Fourth Amendment's warrant requirement is the constitutional prohibition against the exercise of arbitrary governmental power. *Marcus v. Property Search Warrants*, 367 U.S. 717, 728-29 (1961). This core value has historically led the Court to treat general warrants as void *ab initio*, because the power they confer is unrestricted and, therefore, arbitrary. *Entick v. Carrington*, 19 Howell's St. Tr. 1029, 1067-68 (1765). How such warrants are applied, *i.e.*, whether the search conducted under a general warrant was reasonable, is irrelevant. The constitutional value at stake centers on the nature of the power conferred.[6] That is precisely the issue presented here.

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[5] Legal commentators agree that the preclusion of arbitrary enforcement is the "most persuasive justification for vagueness review." Jeffries, "Legality, Vagueness and the Construction of Penal Statutes", 71 Va.L.R. 187, 218 (1985). Professor Jeffries finds the notice aspect of the vagueness doctrine to be "chimeral", *id.* at 210, and discusses at some length the "abstracted and artificial character of the rhetoric of 'fair warning.'" *Ibid.*

[6] *See, e.g., United States v. Marti*, 421 F.2d 1263, 1268-69 (2d Cir. 1970) (that agents executing a general warrant seized only those objects which were, in fact, contemplated by the warrant affidavit, "does not erase the fact that appellants were subject under these warrrants to a greater exercise of power").

Although *Kolender* was the decision primarily relied on by Petitioners before the court of appeals, that court did not give even passing mention to the case in its opinion. Nor did it address *Kolender* in a predecessor opinion which similarly refused to consider a facial challenge to section 1962. *See, United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990).

Further, in defining the due process requirements implicated by Petitioners' vagueness challenge, the court of appeals acknowledged only the "actual notice" component of the clause, restricting its inquiry to "the question of whether a person of reasonable intelligence would know that the conduct we have described constitutes a pattern of racketeering activity." 20a. The due process requirement that statutes provide fixed standards in order to preclude the possibility of arbitrary enforcement—a requirement acknowledged by this Court as the "more important aspect of the vagueness doctrine"—was wholly ignored in the opinion.

Among the questions which could be resolved by a grant of certiorari are the following:

1. Does the question whether a statute "includes within its sweep a substantial amount of constitutionally protected conduct" have any relevance to a facial attack on statutory vagueness?
2. What are the constitutionally relevant distinctions between overbreadth and vagueness analyses?
3. May vagueness standards applicable to economic regulation, *e.g.*, *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, *supra*, properly be applied to criminal statutes? [7]
4. Does the Court's statement in *United States v. Powell*, *supra*, that a statute which fails to define

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[7] *C.f., Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (regarding due process requirements of clarity and definiteness, greater leeway is allowed in the field of economic regulation).

a comprehensible court of conduct is facially void comprise pure *dicta*, or is it a valid parameter of constitutional analysis?

This case presents a clear predicate for clarification of the circumstances under which a criminal statute may be subject to a facial attack for vagueness. Resolution of the questions presented would substantially narrow the range of litigable issues and ensure uniformity and consistency in constitutional adjudication. Petitioners therefore respectfully request that a writ of certiorari issue to review the judgment of the court of appeals.

III. UNCERTAINTY REGARDING THE SCOPE OF 18 U.S.C. § 1962(c) HAS BEEN INCREASED BY CONFLICTING DEFINITIONS OF THE REQUIRED NEXUS BETWEEN THE ENTERPRISE AND THE RACKETEERING ACTIVITY.

A further area of controversy under the RICO statute involves the standard to be applied in assessing the sufficiency of proof that a defendant conducted the affairs of the enterprise *through* a pattern of racketeering activity. The issue arises here in the form of a challenge to the sufficiency of proof that the affairs of the Pittsburgh City Council were conducted through a pattern of bribery.

In presenting this question for review, Petitioners are not asking the Court simply "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Although the issue is clothed in fact, it remains an essential question of law. Efforts to define the required nexus between the enterprise and the racketeering activity have produced conflicting results. The only way such conflicts can be resolved is for the Court to define the legal quantum of proof necessary to meet this element of the charge. The only way such a standard could be defined is by reference to a factual record.

Certain characteristics of the factual record here commend this case as a particularly effective vehicle for re-

view. The question whether the affairs of the enterprise were conducted *through* a pattern of racketeering activity requires, first, some definition of what the enterprise's affairs are. The more precise the definition of "enterprise affairs", the clearer the prism through which the nexus issue will be refracted. That definition is provided here by Article 3 of the Home Rule Charter of the City of Pittsburgh, which delineates and restricts the "affairs" of City Council to express legislative powers that may only be exercised at public meetings. 26a-29a. It is doubtful that a more precise definition—or better analytical prism—could be found.

The conflicts which require resolution are found in the case law of the following circuits. The Fifth, Seventh and Eighth Circuits have held that proof of nexus requires two elements: (1) that the defendant was enabled to commit the racketeering activity solely by virtue of his position in the enterprise; *and* (2) that the racketeering activity affected the function of the enterprise. *United States v. Cauble*, 706 F.2d 1322, 1331-32 (5th Cir. 1983), *cert. den.* 474 U.S. 994; *United States v. Blackwood*, 768 F.2d 131, 138 (7th Cir. 1985), *cert. den.*, 474 U.S. 1020; and *United States v. Ellison*, 793 F.2d 942, 950 (8th Cir. 1986), *cert. den.*, 479 U.S. 937.

The Second Circuit has phrased the same elements in the disjunctive, finding the nexus requirement to be satisfied either upon proof that defendant was enable to commit the racketeering activity solely by virtue of his position in the enterprise *or* upon proof that the racketeering activity affected the function of the enterprise. *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980), *cert. den.* 452 U.S. 961.

The Third Circuit has cited with approval cases from both schools of thought. *United States v. Jannotti*, 729 F.2d 213, 226 (3d Cir. 1984), *cert. den.*, 469 U.S. 880 (citing both *Scotto* and *Cauble, supra*). The Eleventh Circuit has found sufficient nexus with proof that the

facilities and services of the enterprise were "regularly and repeatedly utilized to make possible the racketeering activity." *United States v. Carter*, 721 F.2d 1514, 1527 (11th Cir. 1984).[8]

Given the statute's primary focus on "the conduct of [the] enterprise's affairs", 18 U.S.C. § 1962(c), Petitioners would contend that a definition of nexus that does not require proof of the racketeering activity's affect on enterprise affairs disserves the legislative purpose.

Notably, the record here would not be sufficient to sustain the conviction under any of the above-cited cases. The RICO enterprise was identified as the Pittsburgh City Council. It was therefore incumbent on the government to prove that the affairs of City Council were conducted *through* a pattern of racketeering activity. However, the *only* evidence regarding the affairs of City Council was the introduction of Council minutes recording Woods' oath of office and the introduction of various "warrants" authorizing payment of items purchased by Council in interstate commerce. The warrant items bear no relation to any of the projects or incidents referenced in the indictment. The only other testimony by or about City Council concerned two occasions on which Woods asked a messenger employed by Council to cash two of Wozniak's checks for him at the bank.

There is no evidence that the bribes identified in the indictment and testified to at trial had any affect on the affairs of City Council. To the contrary, the payments all related to matters within the exclusive jurisdiction of independent public agencies—the Housing Authority, the Urban Redevelopment Authority, the Three Rivers Stadium Authority and Alcosan.

Nor is the required nexus demonstrated even under the first prong of *Scotto's* disjunctive standard, requiring

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[8] The jury here was given only the statutory language to consider in evaluating the evidence.

proof that the defendant was enabled to commit the predicate offenses solely by virtue of his position in the enterprise. It was Woods' position on the Board of Directors of the Housing Authority that was of value to Hartman, not his seat on City Council. Woods qualified for that appointment solely by virtue of the fact that he was a resident of the City of Pittsburgh. 35 Pa.C.S. § 1545. Regarding Woods' contacts with the Stadium Authority and Alcoson on Wozniak's behalf, there is similarly no proof that Woods was able to arrange meetings with these agencies solely by virtue of his seat on Council.

RICO left the drafting table something less than a model of clarity. Conflicting circuit opinions on the issue of nexus have added to the interpretative difficulties surrounding the statute. Because resolution of such conflicts is necessary to provide a measure of predictability and uniformity to the statute's application, and because this case is well constructed to enable the Court to achieve such resolution, Petitioners respectfully request that a writ of certiorari issue to review the judgment of the court of appeals.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Filed October 1, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-3044, 90-3045, 90-3046

UNITED STATES

vs.

BENJAMIN H. WOODS,
Appellant in No. 90-3044

MICHAEL A. HARTMAN,
Appellant in No. 90-3045

ABLEBUILT CONSTRUCTION COMPANY, INC.,
a/k/a Ablebuilt Homes, Inc.,
Appellant in No. 90-3046

On Appeal from the United States District
Court for the Western District
of Pennsylvania
(D.C. Criminal Nos. 89-00061-1,
89-00061-2, 89-00061-3)

Argued August 13, 1990

BEFORE: MANSMANN, GREENBERG, and
SEITZ, *Circuit Judges*

(Filed: October 1, 1990)

OPINION OF THE COURT

GREENBERG, Circuit Judge.

On June 22, 1989, appellants Benjamin Woods, Michael Hartman, and Ablebuilt Construction Co., were charged in twenty-nine count indictment which included a RICO count under 18 U.S.C. § 1962(c), the City Council of Pittsburgh being the RICO enterprise, numerous Hobbs Act counts and tax counts, arising from public corruption in the Pittsburgh area.[1] They were all convicted on

[1] The twenty-nine counts contained in the indictment break down as follows. Count 1 charged Woods and Hartman with conspiring to defraud the United States in violation of 18 U.S.C. § 371, by filing false income tax returns. In Count 2 Woods was charged with conspiring with Joseph S. Wozniak, an indicted co-conspirator, with conspiring to defraud the United States in violation of 18 U.S.C. § 371, by filing false income tax returns. Count 3 charged all three appellants with having conducted the affairs of an enterprise, the Pittsburgh City Council, through a pattern of racketeering activity in violation of RICO, 18 U.S.C. § 1962(c). Counts 4 through 10 charged Woods with extorting money, due neither to himself nor his City Council office, from Ablebuilt, through its president Hartman, in violation of the Hobbs Act, 18 U.S.C. § 1951. Counts 11 and 12 charged Woods with extortion from the partnership of Hartman and Hartman acting through Hartman in violation of the Hobbs Act, 18 U.S.C. § 1951. The indictment charged that Hartman was a partner in Hartman and Hartman which was in the construction and property management business. Counts 13 through 15 charged Woods with extortion from Joseph Wozniak in violation of the Hobbs Act, 18 U.S.C. § 1951. Counts 16 through 20 charged Woods with evading payment of his federal income tax for the years 1983, 1984, 1985, 1986 and 1987, in violation of 26 U.S.C. § 7201. Counts 21 and 22 charged Woods with making false statements in his amended federal individual income tax returns for the calendar years 1983 and 1984, in violation of 26 U.S.C. § 7206(1). Counts 23 through 26 charged Hartman with making false statements in his individual income tax returns for the calendar years 1983, 1984, 1985 and 1986, in violation of 26 U.S.C. § 7206(1). Counts 27 through 29 charged Hartman with making false statements in Ablebuilt's federal corporate tax returns for the calendar years 1983, 1984 and 1985, in violation of 26 U.S.C. § 7206(1).

certain counts at a jury trial and have appealed from the judgments of conviction and sentence.[2] While they have raised various issues we have concluded that only their constitutional challenge to their convictions on Count 3, charging a violation of RICO, 18 U.S.C. § 1962(c), warrants discussion.

I. FACTS

Inasmuch as the jury delivered a guilty verdict we relate the evidence in a light favorable to the government. In the early 1980's, Joseph Wozniak, an unindicted co-consiprator who testified with a grant of immunity, was able to have Eco-Seal, a weatherproofing product he sold, specified for use in projects of the Pittsburgh Housing Authority. In addition, Wozniak sold another waterproofing product, Sinak, for use on public projects.[3] In return for these sales, Wozniak bought hundreds of dollars of tickets for political functions from the Director of the Housing Authority, Daniel Pietragallo, paying for them in cash.[4] It appears, however, that the ticket situation was from Wozniak's view point out of control as he was "being hit by a lot of tickets, by a lot of sources" and "was having a problem paying on some of these tickets." Consequently, Wozniak at Pietragallo's suggestion, arranged a meeting with Woods. Woods was known to Wozniak from "political functions" and "fund raisers" and Wozniak was aware that he was a member of both the Pittsburgh City Council and the Board of Directors of the Housing Authority. When Pietragallo told Wozniak to see Woods, Wozniak understood that he was being told to do business with Woods.

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[2] Woods was found guilty on Counts 1, 2, 3, 7, 9 and 11 through 22. Hartman was convicted on Counts 1, 3, and 29. Ablebuilt was found guilty on Count 3.

[3] We note that in the indictment the product is called "Sinac." We are using the spelling "Sinak" as the parties use it in their briefs.

[4] Some payments were made at a Pittsburgh restaurant called "The Common Pleas."

Woods was apparently an influential member of the City Council as he was chairman of its Finance Committee from 1983-1985 and in 1985 was elected its president, an office he held until 1987 when he was elected its President-Pro Tem. Woods also served as a member of the Board of Directors of the Housing Authority at the times material to this case.

At their first meeting, Wozniak agreed to "kick back" to Woods approximately 10% of the gross Wozniak realized from sales of Eco-Seal to contractors for Housing Authority projects. Wozniak understood that the arrangement was that as long as he made the payments to Woods, "everything would continue the way it was." On the other hand, if he did not pay up Wozniak understood that there would be "a very good chance that Eco-Seal would no longer be used" or that a competitior "could come in there with the same arrangement" and he would lose the business. Woods and Wozniak also discussed the use of Eco-Seal in projects of other government agencies and, according to Wozniak, Woods was to use his influence in "opening up doors" and would receive 10% of the gross Wozniak realized from these sales.

In early 1983, in anticipation of a particularly large sale, Woods and Wozniak reviewed how Woods was to be paid and agreed that Wozniak would pay him the 10% directly by check. Not surprisingly, however, they became uncomfortable with this arrangement because of Woods' public position. Accordingly, they agreed that Woods would thereafter be paid through checks made payable to third parties but that his percentage would be increased to 25% of gross sales. On January 4, 1983, in furtherance of this new understanding, Wozniak paid Woods $1,800 for his influence as a member of the City Council. Wozniak instructed his accountant to record the check as the payment of a commission and this transaction is

racketeering act ten in the RICO count.[5] At about the same time Wozniak paid Woods a total of $20,220, through a series of six checks and a political contribution.[6] These six checks comprise six of the eight subparts to racketeering act nine.[7] The $20,220 represented roughly 25% of the $79,600 in gross sales Wozniak had made to a company known as Lori Waterproofing for use on a city project.

While most of the payments to Woods were in consideration for his influence in Housing Authority projects, some of the projects involved were undertaken by the Three Rivers Stadium Authority and the Allegheny County Sanitary Authority (ALCOSAN). Thus, Woods arranged a meeting between Wozniak and the Executive Director of the Three Rivers Stadium Authority following which Wozniak sold Eco-Seal for Three Rivers Stadium, a sale valued at $10,890. For this sale Wozniak paid

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[5] Racketeering act ten charged Woods with soliciting, accepting, and agreeing to accept money from Wozniak in consideration for his assistance, as a member of the City Council, in obtaining contracts for the use of Sinak and Eco-Seal.

[6] At the trial, Wozniak identified six checks he had written and delivered to Woods, specifically including check 466, dated January 3, 1983, payable to Woods for $2,000, and checks numbered 547, 575 and 598, each for $1,500, dated respectively, March 23, April 30, and May 24, 1983, made payable to Pat McFalls Esq. Wozniak tsetified that while these checks were marked "legal services", he had never engaged McFalls for legal services. The other two checks Wozniak identified were payable to B&C Equipment Co.,—one numbered 641 and dated July 8, 1983, for $1,000 and the other dated July 19, 1983, for $12,570. Wozniak testified that he had no knowledge as to the existence or nature of B&C Company. Wozniak also testified that he had made a $300 ocntribution to a campaign of a friend of Woods, in the expectation that $150 of that contribution would then be given to Woods.

[7] Racketeering act nine charged Woods with soliciting, accepting and agreeing to accept money from Wozniak in return for his assistance in insuring that Sinak and Eco-Seal would be specified in Housing Authority projects.

Woods a total of $3,711, through two checks payable to B&C Equipment Rental, one dated October 19, 1983, for $1,000, and a second dated December 21, 1983, for $2,711, payments reflected in racketeering act twelve.[8]

In December 1983, Woods introduced Wozniak to James Creehan, the Executive Director of ALCOSAN, which placed an order for Eco-Seal totaling $3,902.95. At the time of the purchase Wozniak, Woods, and Creehan discussed the fact that ALCOSAN rules required advertisement for competitive bidding on contracts in excess of $4,000. On March 2, 1984, at Woods' instruction, Wozniak wrote a check payable to Burt Labovick, a party unknown to Wozniak, for $500. This transaction, charged as racketeering act eleven,[9] was a payment to Woods, although at trial Wozniak could not recall the particular contract involved. On January 25, 1984, Wozniak paid Woods $1,146 directly by check, a payment Wozniak described as the "kick back" to Woods for the ALCOSAN job.[10] This payment is set forth in the indictment as racketeering act thirteen.[11]

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[8] Racketeering act twelve charged Woods with soliciting, accepting and agreeing to accept both of these checks as consideration for his assistance in having Eco-Seal specified for use in the Three Rivers Stadium project.

[9] Racketeering act eleven charged Woods with soliciting, accepting and agreeing to accept payment from Wozniak in return for his influence in obtaining contracts for the sale of Eco-Seal and Sinak.

[10] While the indictment refers to this check as having been written on January 25, 1984, the record shows Wozniak that testified that the same check was written on "7/25, 1984." *Compare* App. at 520 *with* App. at 41. However, the parties do not address this discrepancy. We believe that January 25, 1984, is the correct date.

[11] Racketeering act thirteen charged Woods with having solicited, acccepted and agreed to accept, money from Wozniak as consideration for Woods' influence in obtaining a contract for the sale of Eco-Seal to ALCOSAN.

In August 1984, Wozniak sold $24,940.90 worth of Sinak to Tri-State Waterproofing for use in a Housing Authority project known as Bedford Dwellings. On August 31, 1984, Wozniak wrote a check payable to Rivell Industrial Contracting, Inc. for $4,400. Wozniak testified that he never had any dealings with that company and that he wrote the check at Woods' instruction to pay him for the Tri-State contract. This transaction is set forth in racketeering act nine.

Wozniak also sold Sinak for use in the construction of the Bloomfield Bridge, Anjo Construction being the contractor on that job. Originally the contract and plans for the bridge specified the use of linseed oil to seal the concrete but Wozniak met with Paul J. McDermott, the Director of the Pittsburgh Department of Engineering and Construction (DEC), to discuss specification of Sinak instead of linseed oil and Woods, at Wozniak's request, also spoke with McDermott about the matter.

The DEC is the agency responsible for the design and construction of Pittsburgh's capital budget projects, but it must obtain authorization from the Finance Committee of City Council before it can award contracts. McDermott knew Woods to have been a member of the Finance Committee during his time as a council member, and was also aware that Woods had been the committee's chairman at sometime between 1983-85. Woods contacted McDermott several times by telephone to promote the use of Sinak on the Bloomfield Bridge project and McDermott testified that he felt that Woods was trying to use his influence to get him to specify the use of Sinak. Specifically, McDermott testified as follows:

> Q. Did you at any time, Mr. McDermott, believe that Mr. Woods was attempting to influence you to use Sinak on the Bloomfield Bridge job?
>
> A. Yes.

Q. Did you at any time feel pressured in any way by Mr. Woods to use Sinak on the Bloomfield Bridge job?

A. Well, I felt the attempt to influence; and if that's calculated as pressure, yes.

Q. What was—in what way did you feel pressured by Mr. Woods?

A. Only by the number of calls and his sense of interest in having the Sinak used.

App. at 968.

Eventually McDermott issued a change order to make Sinak the specified weatherproofing product for the Bloomfield Bridge project and Wozniak supplied it to Anjo Construction. On November 4, 1986, Wozniak sent Anjo Construction an invoice which was later paid for $43,128.36. On January 9, 1987, at Woods' instruction Wozniak wrote a check payable to Faber Rental for $4,300, even though he knew nothing of that company. This check was a payment to Woods for approximately 10% of the value of the Sinak sale on the Bloomfield Bridge. This transaction is set forth in racketeering act fourteen.[12]

During roughly the same time period that he was dealing with Wozniak, Woods entered into a similar relationship with Ablebuilt Construction Co., through its president Michael Hartman. Ablebuilt was in the business of constructing and renovating housing in Pittsburgh, including projects for the Pittsburgh Housing Authority and the Urban Redevelopment Authority.

On March 27, 1984, The Housing Authority entered into an agreement with Ablebuilt to modernize certain

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[12] Racketeering act fourteen charged Woods with soliciting, accepting, and agreeing to accept payment from Wozniak in return for his assistance in having Sinak specified for use on the Bloomfield Bridge project.

row houses as part of a Housing Authority project, known as Northview Heights, for $1,403,000. Louis Billota, a Pittsburgh landscaper, who like Wozniak had been granted immunity, testified that after he heard that Hartman and Ablebuilt had been awarded the Northview contract, he contacted Woods to request that Woods contact Hartman to put a "good word" in for him concerning a possible landscaping subcontract and that Woods told him that "[h]e'd take care of it." Billota made a landscaping sub-contracting bid on Northview Heights for $155,000, and was awarded the subcontract three or four days after his conversation with Woods.

After Bilotta had been awarded the contract, Hartman attempted to withdraw it, causing Bilotta to ask Woods to intervene on his behalf. Woods instructed Bilotta to meet Hartman at a local restaurant, where Hartman produced the contract which he cut to $82,000. Hartman also agreed to advance Bilotta $5,000 so that Bilotta could get back some cars which had been repossessed.

Bilotta began work at Northview in May 1984. The job lasted for about one year and Bilotta was paid weekly. In July 1984, Hartman met Bilotta at the Northview worksite and Bilotta informed him that he was owed $1,000 for the work he had done that week. Hartman then wrote a check payable to Bilotta for $2,000, and asked Bilotta to cash it and give $1,000 to Woods and tell him that Hartman wanted an early progress payment from the Housing Authority.

Bilotta cashed the check and delivered $1,000 to Woods, telling him that Hartman wanted an early progress payment. Woods took the money and told Bilotta that he would take care of it. This payment is set forth in racketeering acts one and five.[13]

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[13] Racketeering act one charged Hartman and Ablebuilt with offering, conferring, and agreeing to confer a bribe upon Woods. Racketeering act five charged Woods with soliciting, accepting and

About a month later, Hartman again approached Bilotta at the Northview worksite with two checks drawn on Ablebuilt's account, both dated August 8, 1984, one for $3,000 and the other for $1,500. Hartman asked Bilotta to deliver the proceeds of the $1,500 check to Woods and to ask him for another early progress payment. Bilotta cashed the two checks, kept $3,000 for his landscaping services and delivered $1,500 to Woods, telling him that Hartman wanted another early progress payment. Woods again told him that "he'd take care of it" and that he was going "to call Danny in Florida", a reference to Housing Authority Director Dan Pietragallo. Pietragallo acknowledged at trial that Woods had contacted him about progress payments on the Northview Heights project. This transaction is set forth in racketeering acts one and five.

In August 1984, Hartman wrote a $3,000 check dated August 16, 1984, payable to Bilotta, who cashed it, giving the proceeds to Woods, a transaction set forth in racketeering acts one and five. Bilotta testified that during his work at the Northview project, he delivered six or seven pay-off checks to Woods, totaling approximately $8,000 or $9,000.

On Hartman's behalf, Woods also contacted Paul Brophy, the Executive Director of the Urban Redevelopment Authority of Pittsburgh. The Redevelopment Authority had its own board of directors but was dependent on the City Council for almost all of its money and for approval of property transactions. Specifically, on March 25, 1985, Woods contacted Brophy about Hartman's redevelopment application for a "project review" concerning a proposal for the construction of subsidized housing. As a result of this contact, Brophy sent Hartman's application to Harvey Young, Director of the Department of Housing, for an expedited review. Young responded in a memo

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agreeing to accept payment from Hartman and Ablebuilt in return for his assistance in obtaining accelerated progress payments for Ablebuilt from the Housing Authority.

dated March 27, 1985, in which he indicated that the Hartman proposal called for a per unit subsidy twice than that routinely granted.

On May 7, 1985, after having received Young's memo, Brophy met with Hartman to negotiate the terms of the proposal. Brophy was very concerned over the cost of Hartman's proposal as government subsidies were involved. In a subsequent telephone conversation between Woods and Brophy concerning Hartman's proposal, Woods told Brophy that he felt that the Redevelopment Authority was being unreasonable and too hard on Hartman, and that it should reformulate its position and move the deal along.

On May 9, 1985, Hartman gave Bilotta a check, payable to Bilotta, for $5,000. Bilotta was to give the proceeds to Woods with a message to " '[t]ell him I'm going to see Paul Brophy at the [Redevelopment Authority]' and for him to take it easy on him." This transaction is set forth in racketeering acts two and six.[14] Bilotta cashed the check and showed the money to his son, then a law student, who advised his father to protect himself by tape recording his conversations with Woods and Hartman.

That same night Bilotta called Woods and told him "I got an envelope for you from Mike" and Woods instructed Bilotta to bring it to his home. When Bilotta delivered the money to Woods he told him that:

> This is from Mike. It's for Paul Brophy. He wants you to talk to Paul Brophy. He's going to be there in a couple of days.

App. at 1286.

Woods took the money and said "okay".

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[14] Racketeering act two charged that Hartman and Ablebuilt offered, conferred and agreed to confer a pecuniary benefit upon Woods in return for his influence with the Urban Redevelopment Authority. Racketeering act six charged that Woods agreed to and did accept payment from Ablebuilt and Hartman, in return for his assistance in obtaining contracts with the Redevelopment Authority.

A week later Hartman called Bilotta and told him that his meeting with Brophy "went okay but not as good as it should have." Bilotta then called Woods and told him that "he better talk to Brophy because it didn't go the way he [Hartman] wanted it to." Woods said he would take care of it. Later, after a Hartman-Brophy meeting, Hartman called Bilotta and told him that "everything went good, and that was it."

Brophy testified as follows to the effect Woods' role had upon the negotiations over Hartman's proposal:

> Q. Sir, what effect, if any, did Defendant Woods' calls to you have on you?
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> A. Well, it—first of all, I always listened to Ben [Woods] when he called because he was basically saying move these things faster along, and I respect that. It put me in a difficult position, however, because we were trying to bargain with Mr. Hartman on this, and I found myself in a situation where I had a City Council person in that negotiation, not in a room in the negotiation, but certainly making phone calls on it.
>
> And it certainly made it tougher for us to negotiate with Mr. Hartman because I'm always—at that point I was always in this juggling situation, you see, wanting to put as little money as possible into the deal, but not wanting the deal to go away. But the person I'm negotiating with has always got to believe that I'm prepared to let the deal go away, or there wouldn't be much of a negotiation going on.
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> And I think the situation I found myself in was that it was very hard for any of us to believe that the deal could go away because Mr. Woods felt so strongly that it should happen.

App. at 1577.

Harvey Young also testified as to contact that he had with Woods concerning Hartman's proposal. Young re-

called that Woods had asked him if he was "taking care of his man," a reference Young understood to be to Hartman.

Bilotta delivered another $1,000 from Hartman to Woods in June 1985, with the message that Hartman's brother Gary was going to be taking an electrical licensing test for the City of Pittsburgh. When Gary Hartman failed the test, Hartman contacted Bilotta and told him to call Woods and tell him about what had happened. Bilotta did so, and Woods told him, "[w]ell, tell Mike [Hartman] not to worry about it when he goes back." A week later Bilotta heard from Hartman that his brother had passed the exam, which was apparently only given to Gary Hartman. The payment of this $1,000 is set forth in racketeering acts three and seven.[15]

In the fall of 1985, after Hartman held a fund raiser on behalf of Woods, Hartman and Woods established direct contact. Bilotta testified that thereafter Woods would no longer return his telephone calls. At this point, roughly late December 1985, to February 1986, Bilotta followed his son's suggestion from the previous May, and recorded his conversations with Woods and Hartman. At a pretrial hearing, Bilotta testified that he had no intention to use the recordings to blackmail or extort money from either Woods or Hartman but rather he made the tapes for his own protection.

On the morning of January 14, 1986, Hartman gave Bilotta two checks, one for $1,500, and a second for $2,000. Bilotta testified that he was supposed to cash these checks and keep $1,500, return $1,000 to Hartman

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[15] Racketeering act three charges Hartman and Ablebuilt with offering, conferring and agreeing to confer payment to Woods in return for his assistance in having Hartman's brother, identified in the indictment only as "a person known to the grand jury," certified as an electrician for purposes of public projects. Racketeering act seven charges that Woods solicited, agreed to accept the $1,000 payment for such assistance.

and give $1,000 to Woods. On that same day Bilotta recorded several conversations he had with Woods and Hartman.

After he received these checks and cashed them, Bilotta returned $1,000 to Hartman. Bilotta then spoke to Woods by telephone a call which Bilotta recorded, and complained that he was paid only $1,500 while he was supposed to receive $2,000 as an advance on work he was to do for Hartman and Ablebuilt. After his conversation with Woods, Bilotta called Hartman and told him that Woods wanted another $1,500 and that he could contact Woods directly to confirm it. About five minutes later Hartman called Bilotta and asked him to come to his house to pick up another check for $1,500, which Bilotta did. Before cashing this check, he gave $2,000 to Woods from the proceeds of the first two checks, and then kept the $1,500 check and $500 for the original two checks for a total of $2,000. This incident is set forth in racketeering acts four and eight.[16]

On February 6, 1986, Hartman gave Bilotta a check for $3,000 to cash with instructions to give $2,000 to Woods. On February 16, 1986, Bilotta received another check for $2,000 from Hartman and gave the whole $2,000 to Woods. These transactions are set forth in racketeering acts two and six.

On March 20, 1986, Hartman gave Bilotta two checks which he signed for Ablebuilt, one for $4,000 and a second for $2,000, both payable to Bilotta. Of the proceeds of the $4,000 check, $2,500 was to be returned to Hartman, and Bilotta was to retain the remaining $1,500

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[16] Racketeering act four charged Hartman and Ablebuilt with offering, conferring and agreeing to confer payment upon Woods for his assistance in obtaining contracts with the Housing Authority of the City of Pittsburgh. Racketeering act eight charged Woods with soliciting, agreeing to accept and accepting payment from Hartman and Ablebuilt in return for his assistance in obtaining contracts with the Housing Authority.

as payment for landscaping work. The proceeds of the $2,000 check were to be given to Woods. Bilotta chashed the checks and, in accordance with Woods' direction, gave $2,000 to Woods' son. The March 20, 1986, check for $2,000 is set forth in racketeering acts four and eight.

On June 22, 1989, the grand jury returned the indictment against Woods, Hartman, and Ablebuilt, all of whom pleaded not guilty. Woods and Hartman filed a joint motion to dismiss Count 3, alleging that RICO is unconstitutionally vague and Woods and Hartman also moved to suppress the tape recordings Bilotta had made of his telephone conversations with them. These motions were denied but the district court did dismiss Counts 24 and 25.

At the conclusion of the government's case, Hartman moved for a judgment of acquittal as to Counts 23, 26 and 27. The Government agreed to a dismissal of Counts 23 and 27, and the court granted Hartman's motion as to Count 26. Appellants then moved unsuccessfully for acquittal on Count 3, charging the RICO violation. After the close of the trial, but before the jury was charged, the court dismissed Counts 4, 5, 6, 10 (Hobbs Act violations as to Woods) and 28 (charging Hartman with making a false statement on Ablebuilt's federal corporate income tax return for 1984).

Woods was eventually found guilty on Counts 1, 2, 3, 7, 9, and 11 through 22 but he was found not guilty on Count 8. He was sentenced to eight years' imprisonment on Counts 3, 7, 9, and 11 through 15, and five years imprisonment on Counts 16 through 19. On the remaining Counts he received sentences of imprisonment of 24 months followed by three year terms of supervised release on Counts 1, 2 and 20 and a one year term of supervised release on Counts 21 and 22. Woods was to serve all of his custodial sentences concurrently. Hartman was convicted on Counts 1, 3 and 29. On Count 1 he was sentenced to 13 months of imprisonment followed

by three years of supervised release and a $30,000 fine. On Count 3, he was fined $10,000 and was sentenced to one year of imprisonment to be served consecutively to that on Count 1. On Count 29 he was sentenced to one years of imprisonment to be served concurrently with the sentence on Count 3. Ablebuilt was convicted on Count 3 and was fined $20,000.

This consolidated appeal followed.

II. CONSTITUTIONALITY OF RICO

Appellants contest their conviction on Count 3, asserting that 18 U.S.C. § 1962(c) is unconstitutionally vague so that they were denied due process of law.[17] Specifically, they urge that the statutory provision prohibiting the conducting of an enterprise's affairs through a "pattern of racketeering activity" is so imprecise that persons of reasonable intelligence are left to guess what constitutes a "pattern of racketeering acivity", thus creating the possibility of arbitrary and discriminatory enforcement.[18]

A statute violates due process of law if it "either forbids or requires the doing of an act in terms so vague that men of ordinary intelligence must necessarily guess as to its meaning and differ as to its application." *Con-*

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[17] Section 1962(c) reads as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

We are exercising plenary review over this constitutional issue.

[18] Appellants do not argue that the statutory phrase "*conduct of such enterprise through*" is unconstitutionally vague. Rather, in appellants' brief it is argued that there was insufficient evidence to establish a nexus between themselves, the predicate racketeering acts and the enterprise to satisfy the requirement that they had conducted the enterprise *through* a pattern of racketeering activity.

nally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926). *See United States v. Pungitore et al.*, 910 F.2d 1084, slip. op. at 25 (3d Cir. 1990). However, vagueness challenges not implicating the First Amendment, "must be examined in the light of the facts of the case at hand." *United States v. Powell*, 423 U.S. 87, 92, 96 S.Ct. 316, 319 (1975). Therefore, outside of the First Amendment context, a party has standing to raise a vagueness challenge only if the challenged statute is vague as to that party's conduct. *New York v. Ferber*, 458 U.S. 747, 767-69, 102 S.Ct. 3348, 3360-61 (1982); *Pungitore*, slip op. at 25.

Appellants contend that their challenge is a facial attack on the constitutionality of RICO and not a challenge as to its application in this particular case. Accordingly, they argue that we should focus solely upon the vagueness of the statutory language itself rather than their conduct. Nevertheless, inasmuch as they have not demonstrated that as applied to them RICO implicates values protected by the First Amendment, they are confined to a challenge that the statute is unconstitutional in its application to their specific conduct. *See Pungitore*, slip op. at 24-25.

This is not the first time that this court has been faced with a constitutional challenge to RICO. In *Pungitore* we rejected an identical constitutional challenge, albeit in an organized crime context. *Pungitore*, slip op. at 21-22. Here, as did the appellants in *Pungitore*, appellants rely heavily upon Justice Scalia's concurrence in *H.J. Inc. v. Northwestern Bell Telephone*, —— U.S. ——, 109 S.Ct. 2893 (1989).

In *H.J. Inc.*, while not faced with a void for vagueness challenge, the Supreme Court was called upon to consider what course of conduct would satisfy RICO's pattern of racketeering activity requirement. *Id.* at 2897. The Court adopted an analytical approach composed of two constituent elements. The first element is one of relatedness

between the predicate racketeering acts which serve as the basis for a RICO prosecution. This relationship is established where the predicate acts charged

> have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing chracteristics and are not isolated events.

Id. at 2901 (citation omitted).

The second constituent element, which requires a showing that "the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity" was the more troubling to the Court. *Id.* The Court indicated that continuity is centrally a temporal concept which can be established through a series of related predicate acts committed over a substantial period of time or by the commission of related predicate acts over a shorter period of time, where the acts by their nature demonstrate a threat of continuity. *Id.* at 2902.

In his concurrence, Justice Scalia took the majority to task for what he considered its "murky discussion" which "has added nothing to improve our prior guidance, which has created a kaleidoscope of circuit positions." *Id.* at 2908. He concluded by noting that:

> No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.

Id. at 2909.

This case, as did *Pungitore*, presents the constitutional challenge Justice Scalia anticipated.

As in *Pungitore*, we are constrained to consider the vagueness challenges in light of the evidence of the con-

duct involved. *Pungitore*, slip. op. at 25. Accordingly, our inquiry focuses upon the question of whether a person of reasonable intelligence would know that the conduct we have described constitutes a pattern of racketeering activity. Clearly, the appellants should have recognized that it was.

Woods' conduct readily satisfies the relatedness plus continuity test of *H.J. Inc.* It was shown that over a four year period he repeatedly solicited and accepted bribes in connection with public matters. By any standard his activities were sufficiently related to satisfy RICO, given the consistency of his activities in methods, purposes, results and participants. Thus, he accepted bribes from Albebuilt, through Hartman, in return for his influence as a City Council member in matters concerning housing construction and renovation contracts with the Housing Authority of the City of Pittsburgh and with the Redevelopment Authority. He solicited and accepted bribes from Ablebuilt, through Hartman, to secure early progress payments on work done for the Housing Authority and he solicited and accepted a bribe from Ablebuilt and Hartman for his influence in licensing Hartman's brother as an electrician for purposes of work on city contracts. Furthermore, he interceded on Hartman's behalf in his negotiations with the Redevelopment Authority. In addition, Woods solicited and accepted bribes from Wozniak for his influence in securing sales of Wozniak's products for use in public projects of the City of Pittsburgh, the Housing Authority and other public agencies.

Woods' conduct also easily satisfies the continuity requirement of *H.J. Inc.* The four years over which these related racketeering acts were committed constitutes a substantial period of time. Accordingly, under *H.J. Inc.'s* relatedness and continuity test, a pattern of racketeering activity obviously existed, thus bringing Woods' course of conduct squarely within the purview of RICO.

Ablebuilt and Hartman were also charged with conduct easily meeting the *H.J. Inc.* relatedness plus continuity test. Ablebuilt and Hartman were charged with multiple racketeering acts of bribery and, in fact, they bribed Woods on many occasions over an extended period. As with Woods, the racketeering acts are sufficiently related to satisfy RICO given the similarity of the methods, goals, results, and identity of the parties. They bribed Woods in return for his influence in matters concerning construction contracts with the Housing Authority of Pittsburgh and for his assistance in matters concerning construction contracts with the Urban Redevelopment Authority. Furthermore, they bribed Woods in the matter of licensing Hartman's brother for electrical work on city projects.

The continuity of these related acts is also established were committed. Accordingly, because the racketeering activity of Ablebuilt and Hartman, being both related and continuous, constitutes a pattern of racketeering activity which RICO clearly prohibits, RICO was not unconstitutionally vague as to them.[19]

In *Pungitore*, we indicated that:

> Unlike in *H.J., Inc.*, which involved allegations of corruption within the ranks of a legitimate business, the application of RICO to the activities of the Scarfo crime family could not have come as a surprise to the members of the family. In fact, we have doubts that a successful vagueness challenge to RICO ever could be raised by defendants in an organized crime case. Certainly appellants' attempt to do so has been singularly unpersuasive.

Pungitore, slip op. at 27.

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[19] Appellants also urge that 18 Pa. Cons. Stat. Ann. § 4701 (Purdon 1983), the Pennsylvania bribery statute the violation of which was referred to in racketeering activity charged in Count 3 is unconstitutionally vague. We reject this contention.

We think that much the same thing can be said in this political corruption case. The application of RICO to the activities of these defendants should not have come as a surprise to them. Whatever might be true in other cases, 18 U.S.C. § 1962(c) is not unconstitutional when applied in this ongoing, hardcore political corruption case.

III. THE REMAINING ISSUES

Appellants have raised the following additional issues:

1. The tape recordings made by Bilotta should have been suppressed;

2. At Count 3, the evidence was insufficient to prove the required nexus between appellants, the enterprise and the racketeering activity;

3. At Count 3, the court impermissibly broadened the bases for conviction by instructing the jury that any exercise of discretion by Woods' as a public servant was sufficient to support conviction of the predicate offenses;

4. Under the Hobbs Act, the evidence was insufficient to prove that Woods exploited the inherently coercive power of his office to obtain money from Wozniak or Hartman;

5. The trial court improperly restricted cross-examination of Bilotta, a principal government witness;

6. In applying the sentencing guidelines to Woods' conviction of tax violations, the court erred in applying a four-level increase for his role in the offense;

7. In applying the sentencing guidelines to Hartman's conviction for conspiracy at Count one, the court erred in applying a two-level increase for his role in the offense;

8. The government abused statutory construction doctrine in its effort to rewrite section 2515 of the Wiretap Act.

We have carefully examined these contentions under the appropriate standards of review and have concluded they are clearly without merit.

IV. CONCLUSION

Having concluded that appellants' convictions under RICO were not a deprivation of due process of law, and that their other objections are not meritorious, we will affirm the judgments of conviction and sentence on all counts.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

OPINION OF THE DISTRICT COURT

(Transcription of proceedings, October 2, 1989)

"As part of your motion to dismiss, you allege in your Roman Numeral Two that it should be dismissed because the indictment is vague . . . Your motion is denied. They are not unconstitutionally vague."

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 89-61

UNITED STATES OF AMERICA

v.

BENJAMIN H. WOODS, *et al.*,
Defendants

MOTION TO DISMISS

* * * *

II. DUE PROCESS: STATUTORY VAGUENESS

46. The Racketeering Influence and Corrupt Organizations Act, 18 U.S.C. § 1962(c) (Count Three) is unconstitutionally vague on its face, e.g., in failing to define with sufficient precision the phrase, "pattern of racketeering activity".

47. Further, 18 Pa.C.S. § 4701, the state statute relied on by the government to establish the predicate acts of racketeering, provides no standards useful in ascertaining what is meant by the term, "other exercise of discretion as a public servant" and is, therefore, unconstitutionally vague on its face and overly broad as applied to Defendant.

48. Count Three of the indictment should therefore be dismissed with prejudice.

* * * *

STATUTES INVOLVED

18 U.S.C. § 1962(c)

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 Pa.C.S. § 4701(a)

(a) Offenses defined.—A person is guilty of bribery, a felony of the third degree, if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

(1) any pecuniary benefit as consideration for the decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter by the recipient.

(2) any benefit as consideration for the decision, vote, recommendation or other exercise of official discretion by the recipient in a judicial, administrative or legislative proceeding; or

(3) any benefit as consideration for a violation of a known legal duty as public servant or party official.

ARTICLE 3, HOME RULE CHARTER, CITY OF PITTSBURGH

ARTICLE 3
LEGISLATIVE BRANCH

301. THE COUNCIL

The legislative power of the City shall be vested in a council.

* * * *

308. PROHIBITIONS

Members of council shall not:

a. hold any office, position or employment in any corporation holding or applying for franchises from the City;

b. have a personal or private interest in any legislation proposed or pending before council, unless they:

   1. disclose the fact to council; and

   2. refrain from voting or participating in the discussion of the matter;

c. hold any other office, position or employment in the government of the United States, the Commonwealth of Pennsylvania, the City of Pittsburgh or Allegheny County; except,

   1. officer or member in the federal reserve;

   2. officer or member in the National Guard of Pennsylvania;

   3. member of an authority as limited by section 220.

Members of council who violate any of the above provisions shall immediately forfeit their office.

* * * *

310. POWERS OF COUNCIL

Council shall have the following . . . powers:

a. to employ or retain its own staff and consultants including a city clerk and an attorney qualified to practice law before the Supreme Court of Pennsylvania, who may act as legal advisor to council, and may represent council as a body in legal proceedings. Council's attorney shall not represent the City as a municipal corporation in any legal proceeding;

b. to conduct investigations in accordance with the provisions of this charter;

c. to approve appointments as provided by this charter, except as otherwise mandated by law;

d. to exercise the power of removal as provided by this charter;

e. to override the veto of the mayor by a two-thirds vote of all the members;

f. to call a meeting at any time between council and the mayor jointly to discuss legislation or the business of the City in general, and to compel the attendance of the mayor at a council hearing;

g. to authorize the sale of city services outside the City so long as services to the City are not impaired;

h. to fix, by resolution, the salary of all elected city officials, but no elected city official shall receive a salary increase that exceeds the average percentage of increase in salaries and wages paid to all city employees as based on the previous year's salary. Further, the salary paid to elected city officeholders shall not be diminished during their term in office;

i. to exercise others powers conferred by this charter, by law or ordinance, consistent with the provisions of this charter.

311. REMOVAL POWER

Council shall have the power to remove from office for cause any person appointed to office with the required approval of council. Commission of any corrupt act or practice, malfeasance, or the willful commission of any fraud upon the City shall constitute cause for removal. Council shall give any person charged due notice and an opportunity to be heard. Removal shall be effective upon passage of a resolution which receives the affirmative vote of a majority of all council members.

312. INVESTIGATIONS

Council shall have power, by resolution, to authorize investigations to be conducted by council or by a committee of council. Investigations may deal with legislative or administrative matters. The subject of the investigation shall be stated in the resolution authorizing the investigation. Council may reopen the budget to provide funds for the investigation. The presiding officer of council or the committee shall have the power to administer oaths to witnesses.

313. PUBLIC MEETINGS

Council and its committees shall exercise its powers only at meetings which shall be open for public attendance.

314. ROLL CALL VOTES

All final action in adopting legislation shall be by roll call vote, and the vote of each member of council shall be entered in the minutes of the meeting.

315. CONDUCT OF BUSINESS

Council shall conduct and hold meetings at which legislation may be introduced and passed at least fifty weeks during the calendar year.

316. LEGISLATION

Council may legislate by ordinance or resolution. Ordinances shall deal with general rules of continuing effect. Resolutions shall deal with specific matters such as authorization of contracts, salaries, appropriations and budget transfers. All ordinances and resolutions introduced shall be kept in a place accessible to the public at all reasonable times.

No. 90-1058

In the Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL A. HARTMAN AND BENJAMIN H. WOODS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
JOEL M. GERSHOWITZ
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QUESTIONS PRESENTED

1. Whether the "pattern of racketeering activity" element of the RICO statute is unconstitutionally vague.

2. Whether the evidence established the requisite nexus between the charged enterprise and petitioners' predicate acts of racketeering.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 915 F.2d 854.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1990. The petition for a writ of certiorari was filed on January 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted on one count of participat-

ing in the affairs of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c). In addition, Woods was convicted on two counts of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; six counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951; five counts of income tax evasion, in violation of 26 U.S.C. 7201; and two counts of making false statements on an income tax return, in violation of 26 U.S.C. 7206(1). Hartman also was convicted on one conspiracy count and one count of making a false statement on an income tax return. Woods was sentenced to eight years' imprisonment, to be followed by three years of supervised release. Hartman was sentenced to 25 months' imprisonment, to be followed by three years of supervised release, and a $40,000 fine. The court of appeals affirmed. Pet. App. 1a-22a.

1. The evidence at trial is described in detail in the court of appeals' opinion. Pet. App. 3a-15a. From 1983 to 1985, petitioner Woods was a member of the Pittsburgh, Pennsylvania, City Council, and chairman of its Finance Committee. He was elected to serve as Council President in 1985 and as President Pro-Tem in 1987. He also served as a member of the Board of Directors of the Pittsburgh Housing Authority. *Id.* at 4a.

In the early 1980s, Joseph Wozniak, who sold weatherproofing products to the Housing Authority, agreed to "kick back" to Woods approximately 10% of the gross revenues Wozniak realized from the sale of his products to contractors for Housing Authority projects. Wozniak understood that if he did not make the kickback payments, the Housing Authority would stop using his products. In addition, Woods and Wozniak agreed that, in return for the kick-

backs, Woods would use his influence in "opening up doors" for Wozniak at other municipal agencies. Eventually, Woods' share was increased to 25% of Wozniak's gross sales. Pet. App. 3a-4a. In all, Wozniak paid at least $35,000 to Woods as part of their arrangement, mostly by way of checks made payable to third parties in order to disguise the nature of the payments. *Id.* at 4a-8a.

During the period he was dealing with Wozniak, Woods entered into a similar relationship with petitioner Hartman, the president of Ablebuilt Co., which was in the business of constructing and renovating housing in Pittsburgh, including projects for the Housing Authority and the Urban Redevelopment Authority. From March 1984 to March 1986, Woods received payments of at least $22,000 from Hartman. In return for those payments, Woods exercised his influence in securing early progress payments on Ablebuilt's work for the Housing Authority, in helping Ablebuilt in its contract negotiations with the Redevelopment Authority, and in licensing Hartman's brother as a city electrician. The payments were made from the proceeds of checks issued to one of Ablebuilt's subcontractors, Louis Billota, who acted as an intermediary between Hartman and Woods. Pet. App. 8a-15a.

2. On appeal, petitioners contended that the "pattern of racketeering activity" element of RICO is unconstitutionally vague.[1] The court of appeals re-

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[1] The principal substantive provision of RICO, 18 U.S.C. 1962(c), prohibits a person employed by or associated with a RICO enterprise from conducting or participating in the enterprise's affairs "through a pattern of racketeering activity." The statute provides that such a pattern "requires at least two acts of racketeering activity" committed within ten years of each other. 18 U.S.C. 1951(5).

jected that contention. It began by noting that outside of the First Amendment context, a party may challenge a statute for vagueness only on the basis that the statute is vague as applied to the party's conduct in a particular case. In light of petitioners' failure to claim that their RICO prosecution implicated any constitutionally protected conduct, the court viewed petitioners' challenge as confined to a claim that the statute was vague as applied to them. Pet. App. 17a.

Examining petitioners' conduct, the court concluded that RICO's "pattern of racketeering activity" element was not vague as applied to this case. The court noted that under this Court's decision in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989), the predicate acts of racketeering must be related to one another and amount to or pose a threat of continuing criminal conduct in order to constitute a "pattern." Pet. App. 17a-18a. Applying *H.J. Inc.*, the court found that the relatedness plus continuity test was "readily satisfie[d]" here. *Id.* at 19a. The court explained that each petitioner's acts of racketeering extended over a substantial period of time and involved the same methods, purposes, results, and participants. *Id.* at 19a-20a. The court concluded that, whatever might be true in other cases, the application of RICO to this "ongoing, hardcore political corruption case" should "not have come as a surprise to [petitioners]." *Id.* at 21a.

Petitioners also contended that the evidence failed to establish the requisite nexus between themselves, the RICO enterprise (the City Council), and the predicate acts of racketeering activity. Without discussion, the court of appeals rejected that contention (among others) as "clearly without merit." Pet. App. 22a.

ARGUMENT

1. Petitioners renew their contention (Pet. 6-14) that the pattern of racketeering element of a RICO offense is unconstitutionally vague. They rely on the concurring opinion in *H.J. Inc.*, 109 S. Ct. at 2906-2909, in which Justice Scalia, joined by three other Justices, expressed doubts about whether the RICO "pattern" requirement could withstand a constitutional vagueness challenge. The court of appeals correctly rejected petitioners' challenge to RICO, and its holding is consistent with the holding of every other court of appeals that has considered that contention in the wake of *H.J. Inc.* See *United States* v. *Masters*, No. 89-2851 (7th Cir. Feb. 6, 1991), slip op. 6-7; *United States* v. *Glecier*, No. 88-3417 (7th Cir. Jan. 8, 1991), slip op. 2 n.1; *United States* v. *Coiro*, No. 90-1192 (2d Cir. Jan. 3, 1991), slip op. 7621-7622; *United States* v. *Angiulo*, 897 F.2d 1169, 1178-1180 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990).[2]

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[2] Before *H.J. Inc.* as well, the courts of appeals had uniformly held that the RICO statute is not unconstitutionally vague. See, *e.g.*, *United States* v. *Tripp*, 782 F.2d 38, 41-42 (6th Cir.) (reference to state law in predicate acts did not render statute vague), cert. denied, 475 U.S. 1128 (1986); *United States* v. *Ruggiero*, 726 F.2d 913, 923 (2d Cir.), cert. denied, 469 U.S. 831 (1984); *United States* v. *Martino*, 648 F.2d 367, 381 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); *United States* v. *Morelli*, 643 F.2d 402, 412 (6th Cir.) (collecting cases), cert. denied, 453 U.S. 912 (1981); *United States* v. *Aleman*, 609 F.2d 298, 305 (7th Cir. 1979) (enterprise element), cert. denied, 445 U.S. 946 (1980); *United States* v. *Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978) (RICO conspiracy), cert. denied, 441 U.S. 933 (1979); *United States* v. *Campanale*, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

Petitioners do not argue that the "pattern of racketeering activity" element of RICO was vague as applied to them. To sustain such a vagueness attack, petitioners would have to establish that RICO fails to give a person of ordinary intelligence reasonable notice that his conduct is prohibited. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). This Court explained in *H.J. Inc.* that proof of a RICO pattern requires a showing that the predicate criminal acts bear a relationship to each other, in that the crimes are similar in purpose, result, participants, victims, methods of commission, or in other ways, and that there is continuity in the course of criminal conduct or a threat of continuity. 109 S. Ct. at 2901. Whatever ambiguity there may be at the margins, petitioners' participation in this case of "ongoing, hardcore political corruption," Pet. App. 21a, unmistakably satisfied the pattern requirement. Petitioner Woods "repeatedly solicited and accepted bribes in connection with public matters" over a period of four years; throughout that period, the bribery scheme exhibited similar "methods, purposes, results, and participants." *Id.* at 19a. Petitioner Hartman's conduct likewise reflected a clear pattern of continuing activity; he "bribed Woods on many occasions over an extended period" to obtain Woods' influence in public construction projects in which Hartman was interested. *Id.* at 20a. On these facts, the court of appeals correctly concluded that "[t]he application of RICO to the activities of these defendants should not have come as a surprise to them." *Id.* at 21a. See also *United States* v. *Pungi-*

tore, 910 F.2d 1084, 1105 (3d Cir. 1990), petition for cert. pending, No. 90-6524.[3]

Instead of contending that RICO is vague as applied to their own conduct, petitioners urge this Court to undertake a facial review of the constitutionality of RICO's pattern element. When constitutionally protected conduct is not implicated, however, this Court has consistently refused to consider vagueness challenges to statutes on the basis of facts not before the Court. See *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982) (a facial challenge to a criminal statute based on vagueness will be permitted only if the statute reaches "a substantial amount of constitutionally protected conduct"); *Kolender* v. *Lawson*, 461 U.S. 352, 358-359 n.8 (1983). Rather, the defendant must establish that the statute is vague as applied to the particular conduct with which he is charged. *Hoffman Estates*, 455 U.S. at 494-495 & n.7; *United States* v. *Powell*, 423 U.S. 87, 92 (1975); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). In each of the cases cited by petitioners in which the Court has held a criminal statute facially void because of vagueness (Pet. 11-12), the

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[3] In view of the fact that petitioners' RICO violations required the commission of at least two predicate acts of extortion and bribery—crimes that petitioners do not suggest are unduly vague—it is difficult to imagine how petitioners could have lacked fair notice that their conduct was prohibited. Cf. *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 57 n.7 (1989) ("[I]t would seem that the RICO statute [as applied to predicate acts of obscenity] is inherently *less* vague than any state obscenity law: a prosecution under the RICO law will be possible only where all the elements of an obscenity offense are present, and then some.").

statute implicated constitutional rights. See *Kolender* v. *Lawson*, *supra* (First Amendment rights); *Colautti* v. *Franklin*, 439 U.S. 379 (1979) (right to abortion); *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974) (First Amendment rights); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972) (First Amendment rights).[4]

There is no contention in this case that RICO implicates constitutionally protected conduct; indeed, petitioners disclaim that suggestion and purport to make "a pure due process attack" based on their view that RICO is not sufficiently clear. Pet. 11. But petitioners offer no reason for the Court to depart from its practice of evaluating vagueness challenges in a factually concrete setting, rather than abstractly canvassing all conceivable applications of a statute. It would be particularly inappropriate to do so for RICO, in light of this Court's expressed preference for fleshing out the pattern requirement "in the context of concrete factual situations presented for decision." *H.J. Inc.*, 109 S. Ct. at 2902.

Contrary to petitioners' suggestion (Pet. 12), a facial challenge is not necessary to fulfill the goal of giving sufficient guidance to law enforcement officials in order to prevent arbitrary enforcement of RICO. Cf. *Kolender*, 461 U.S. at 357-358. As the

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[4] In *Giacco* v. *Pennsylvania*, 382 U.S. 399 (1966), the Court invalidated on due process grounds a statute that permitted a jury to impose costs on an acquitted defendant without any governing standards at all. Although the statute in *Giacco* did not regulate constitutionally protected primary conduct, *Giacco* is distinguishable from this case because the statute examined in that case was vague in all of its applications, including as applied to the particular defendant challenging it. Petitioners make no contention that RICO is vague as applied to them.

uniform rejection of vagueness challenges by the courts of appeals demonstrates, RICO does give adequate guidance to prosecutors; petitioners' case is no exception to that rule. If the danger of arbitrary enforcement of RICO exists, that contention can be addressed when it is raised by the facts of a particular defendant's case.

2. Petitioners also contend (Pet. 14-17) that review is warranted to clarify the standards governing whether a defendant has conducted the affairs of a RICO enterprise "through" a pattern of racketeering activity. They argue that on the facts of this case there was an insufficient "nexus" between the Pittsburgh City Council (the enterprise) and their predicate acts of racketeering to satisfy this requirement of RICO.[5]

The courts of appeals have employed different linguistic formulations to describe the appropriate test for determining whether a sufficient nexus exists between the charged enterprise and the predicate acts of racketeering. Some courts have applied a formulation originating in *United States* v. *Cauble*, 706 F.2d 1322, 1333 (5th Cir. 1983), cert. denied, 474 U.S. 994 (1985), that requires a showing, where the enterprise itself is not devoted to unlawful activity, that "(1) the defendant has in fact committed the racketeering acts as alleged; (2) the defendant's position in the enterprise facilitated his commission of the racketeering acts, and (3) the predicate acts had some effect on the lawful enterprise." See *United States* v. *Ellison*, 793 F.2d 942, 950 (8th Cir.)

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[5] The statute requires proof that the defendant conducted or participated in the enterprise's affairs "through" the pattern of racketeering; this requirement is often called a "nexus" requirement. 18 U.S.C. 1962(c).

(same), cert. denied, 479 U.S. 937 (1986); *United States* v. *Blackwood*, 768 F.2d 131, 138 (7th Cir.) (same), cert. denied, 474 U.S. 1020 (1985); *United States* v. *Pieper*, 854 F.2d 1020, 1024 (7th Cir. 1988) (same).

Since *United States* v. *Scotto*, 641 F.2d 47, 54 (1980), cert. denied, 452 U.S. 961 (1981), the Second Circuit has used a different formulation of the test. It has treated the nexus requirement as requiring the government to show either that (1) the defendant was "enabled to commit the predicate offenses" solely because of his position in, involvement with, or control over, the enterprise's affairs, or (2) "the predicate offenses are related to the activities of the enterprise." See *United States* v. *Simmons*, No. 88-1504 (2d Cir. Jan. 11, 1991), slip op. 1267-1268 (collecting cases); see also *United States* v. *Yarbrough*, 852 F.2d 1522, 1544 (9th Cir. 1988) (applying *Scotto*). The Third Circuit, in prior cases, has cited the *Scotto* formulation with approval. *United States* v. *Jannotti*, 729 F.2d 213, 226 (3d Cir.), cert. denied, 469 U.S. 880 (1984).

As a practical matter, it is far from clear that the two approaches lead to different results in particular cases; we are not aware of any such conflicts. Even as a theoretical matter, the two stated tests are not incompatible, because the formulations in *Cauble* and *Scotto* do not appear to express different substantive requirements. To begin with, it is difficult to conceive of instances in which a defendant's predicate acts were "related" to the enterprise's activities or enabled by the defendant's position in it, as *Scotto* requires, yet were not facilitated by the defendant's association with the enterprise and did not have an effect on the enterprise, as required by *Cauble*. Moreover, the principal purpose of the test announced in

Cauble is to ensure that a defendant is not held to have conducted the affairs of a legitimate business "through" racketeering activity simply because the "defendant works for a legitimate enterprise and commits racketeering acts while on the business premises." 706 F.2d at 1332. The Third Circuit has expressly acknowledged the validity of that concern, *United States* v. *Jannotti*, 729 F.2d at 226, and has accommodated it within the framework of the *Scotto* approach.[6]

In any event, the evidence in this case satisfied the nexus test regardless of the formulation applied.[7] The evidence clearly demonstrated that Woods' position on the Pittsburgh City Council facilitated his bribery scheme and that it affected the Council's functions. Woods' very ability to obtain business for Wozniak and Hartman from various public and quasi-public agencies derived from his membership on the City Council, which had the responsibility of authorizing expenditures for city projects and over-

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[6] The absence of any substantive difference between the standards is illustrated by *United States* v. *Carter*, 721 F.2d 1514, 1527 & n.16 (11th Cir. 1984), where the court expressly declined to determine whether the *Cauble* formulation or some other test was appropriate, but held that *Cauble* would be satisfied, and the requisite nexus established, when a defendant routinely employed a legitimate enterprise's resources "to make possible the racketeering activity."

[7] The sufficiency of the evidence is the only issue that petitioners preserved for review. Hartman requested a jury instruction on the nexus issue, which the district court agreed to give "in other words." X Gov't C.A. App. 2767. The court then gave an instruction, *id.* at 2941, to which petitioners made no objection before the jury began its deliberations as required by Fed. R. Crim. P. 30. Nor did petitioners challenge the jury instruction in the court of appeals, where they argued only that the evidence was insufficient to establish a nexus. Pet. App. 21a.

seeing city agencies generally.[8] Petitioners argue (Pet. 16) that it was Woods' position on the Board of Directors of the Housing Authority that was of value to Hartman, not his seat on the City Council. But petitioners overlook that one seat on the Board of Directors of the Housing Authority is required under local law to be held by a councilman, and Woods held his board seat while a member of the Council. II Gov't C.A. App. 423, 448. The Council therefore played an integral role in the Housing Authority's management, and Woods' crimes undermined the Council's ability to carry out that role. Petitioners also overlook that Woods corruptly assisted Hartman in connection with contracts with the Urban Redevelopment Authority, which depended on the Council for funding and approval of its property transactions. Pet. App. 10a. When a city councilman solicits bribes for influencing the award of city contracts by city agencies, he necessarily impairs the Council's fulfillment of its responsibility to protect the city against corruption in the conduct of city government. In sum, because petitioners' conduct satisfied the nexus requirement under the tests applied in all circuits, this Court's review is not warranted.

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[8] For example, the director of the Three Rivers Stadium Authority testified that he agreed to meet with Wozniak at Woods' request because Woods had been supportive of the Stadium Authority on the City Council. IV Gov't C.A. App. 880. And the Executive Director of the Allegheny County Sanitation Authority, who arranged at Woods' request to purchase Wozniak's product, noted that, as city councilman from the Northside, Woods had more impact on the operation of the Sanitation Authority than the average councilman. *Id.* at 932.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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